

2006

William R. Rothstein, an individual v. Snowbird Corporation, a Utah corporation : Brief of Appellee

Utah Court of Appeals

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Jesse Trentadue, Esq.; Suttter Axland; Attorneys for Appellant.

Gordon Strachan, Esq.; Kevin J. Simon, Esq.; Strachan and Strachan; Attorneys for Appellee.

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IN THE UTAH SUPREME COURT

WILLIAM ROTHSTEIN, an individual,	:	
	:	
Plaintiff/Appellant,	:	
	:	
	:	Appeal No. 20060158 - SC
v.	:	
	:	
	:	
SNOWBIRD CORPORATION, a Utah	:	
corporation,	:	
	:	
Defendant/Appellee.	:	
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BRIEF OF APPELLEE SNOWBIRD CORPORATION

APPEAL FROM THIRD DISTRICT COURT JUDGE ANTHONY QUINN

Jesse Trentadue, Esq. (4961)
SUITTER AXLAND
8 East Broadway, Suite 200
Salt Lake City, Utah 84111
Attorneys for Plaintiff/Appellant
William Rothstein

Gordon Strachan, Esq. (3133)
Kevin J. Simon, Esq. (8100)
STRACHAN & STRACHAN, P.C.
401 Main Street, Second Floor
P.O. Box 1800
Park City, Utah 84060-1800
Attorneys for Defendant/Appellee
Snowbird Corporation

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SUITTER AXLAND
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Salt Lake City, Utah 84111
Attorneys for Plaintiff/Appellant
William Rothstein

Gordon Strachan, Esq. (3133)
Kevin J. Simon, Esq. (8100)
STRACHAN & STRACHAN, P.C.
401 Main Street, Second Floor
P.O. Box 1800
Park City, Utah 84060-1800
Attorneys for Defendant/Appellee
Snowbird Corporation

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STATEMENT OF JURISDICTION

As described further in Snowbird's *first* Motion for Summary Disposition, Snowbird disputes that appellate jurisdiction exists here because Rothstein voluntarily dismissed his *gross* negligence claim *without* prejudice. Snowbird does not, however, object to Rothstein's alternative position that his *gross* negligence claim be dismissed *with* prejudice if no jurisdiction otherwise exists. If Rothstein's *gross* negligence claim is dismissed *with* prejudice, the Utah Supreme Court will then have jurisdiction over Rothstein's appeal pursuant to Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF ISSUES

This appeal challenges Third Judicial District Court Judge Anthony Quinn's ("Judge Quinn") decision granting Snowbird's Summary Judgment Motion and dismissing Rothstein's *ordinary* negligence claim *with* prejudice.

1. Did the trial court correctly grant Snowbird summary judgment, dismissing Rothstein's *ordinary* negligence claim based on either of the two Release Agreements Rothstein voluntarily signed as an adult? (R. at 174-194, 324-376, 417-418).

In reviewing summary judgment, the trial court's conclusions of law, finding no genuine issues of disputed *material* fact are reviewed de novo for correctness. See Archer v. Board of State Lands & Forestry, 907 P.2d 1142, 1144-45 (Utah 1995).

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition in the Court Below.

This is a personal injury case involving a 50 year old long-time recreational skier (Rothstein) who injured himself at Snowbird Ski Resort in Little Cottonwood Canyon, Utah. (R. at 1-9, 344). On December 7, 2004, Rothstein filed a Complaint against Snowbird alleging claims for ordinary negligence. (R. at 1-9). On August 26, 2005, Snowbird filed a Motion for Summary Judgment, requesting Judge Quinn to dismiss *with* prejudice Rothstein's *ordinary* negligence claims. (R. at 174-194, 324-376). On January 23, 2006, Judge Quinn signed an Order granting Snowbird's Summary Judgment Motion and dismissing *with* prejudice Rothstein's *ordinary* negligence claims. (R. at 417-418). Judge Quinn, as part of the same Order, denied Rothstein's Cross-Motion for Partial Summary Judgment re: Snowbird's Eighth Affirmative Defense (i.e. Release Agreement defense) and Rothstein's Rule 56(f) Request (or "Motion") for Continuance. (R. at 417-418). Rothstein did not appeal Judge Quinn's denial of the Rule 56(f) Request.

Judge Quinn also granted, by separate Order, Rothstein's Motion to Amend to add a *gross* negligence claim. (R. at 415-416). Rothstein amended his Complaint, eliminating his *ordinary* negligence claim, and replacing it with a *gross* negligence claim. (R. at 419-425). Rothstein also *contemporaneously* filed a Notice of Voluntary Dismissal *without* Prejudice concerning his *gross* negligence claim and then appealed. (R. at 426-427).

II. Statement of the Facts

On February 3, 2003, Rothstein injured himself skiing at Snowbird just below a cat track and a permanent orange flagged rope-line used for warning and skier awareness purposes. (R. at 2-3, 84-90). Rothstein collided with mine timber cribbings (referred to by Rothstein as “railroad ties”) installed in 1983 to support structurally the cat track immediately above. (R. at 2-3, 84-90). To access these mine timber cribbings, Rothstein skied off the cat track and into an area below the cat track and the permanent rope-line. (R. at 2-3).

Other than Rothstein’s 2003 incident, no other injuries have ever occurred in connection with the mine timber cribbings. (R. at 84-86). The mine timber cribbings and the permanent rope-line immediately above it have existed since the Summer of 1983. (R. at 84-86).

On November 20, 2002, approximately 2 ½ months prior to Rothstein’s incident, Rothstein voluntarily signed two separate Release of Liability Agreements for the 2002-2003 ski season. (R. at 185, 189-191), Ex. ‘A’ to Addendum. As part of these Release Agreements, Rothstein expressly agreed to assume all risks of injury *and* released Snowbird from liability for its own negligence. (R. at 185, 191), Ex. ‘A’ to Addendum. Rothstein asked no questions concerning the Releases and no verbal representations were made to him. (R. at 177, 186-190, 209). One Release was signed in exchange for an Alta-Snowbird 2002-2003 Seasons Pass and the other Release was signed for a Seven Summits Club membership. (R. at 185, 191). The Seven Summits membership entitled him to cut in front of other skiers in the aerial Tram line for faster access to the ski slopes. (Appellant’s Brief at 1, fn. 1).

Rothstein did *not* have to ski and, in any event, could have skied without signing a Release Agreement. (R. at 351, 356-362). Among other options, Rothstein could have skied at Snowbird on a day pass or could have purchased a 2002-2003 Seasons Pass for Park City Mountain Resort without ever signing a Release. (R. at 351, 356-362).¹

SUMMARY OF ARGUMENT

Rothstein voluntarily signed two Release Agreements for the 2002-2003 ski season that expressly released Snowbird from liability for injuries resulting from Snowbird's negligence. (R. at 185, 189-191). Rothstein signed these Releases 2 ½ months *prior* to injuring himself on February 3, 2003, and, thus, had ample time to contemplate whether to sign the Releases or not. (R. at 185, 189-191).

Unlike hospital care, public transportation or utilities, recreational skiing does not implicate matters of "great public importance" or "practical necessity" and is not an "essential service". Indeed, the great majority of jurisdictions enforce pre-injury exculpatory agreements in the recreational activities context. Additionally, Utah's Inherent Risk of Skiing Act does not evidence a legislative intent to prohibit exculpatory agreements. When Utah's legislature seeks to bar exculpatory or other agreements, it states so expressly. Utah's legislature chose not to do so in Utah's Inherent Risk Act. Instead, Utah's legislature focused

¹ In everything Rothstein files with this Court, including his Appellant's Brief, he recounts his purported injuries. The nature of Rothstein's injuries are *irrelevant* here because the Release Agreements clearly and unequivocally released Snowbird from liability for its own negligence. In addition, Rothstein also expressly assumed all risks of injury, including injuries caused by Snowbird's purported negligence. Regardless, this Court should be aware that Rothstein undisputedly returned to the slopes and skied 36 days the following season at Snowbird alone - a fact that Rothstein does not disclose. (R. at 193-194).

on protecting Utah's ski resorts from sharply rising insurance premiums and minimal insurance coverage options - a public policy consistent with enforcing exculpatory agreements. Thus, Judge Quinn's decision granting Snowbird's Summary Judgment and dismissing *with* prejudice Rothstein's *ordinary* negligence claims should be affirmed.

ARGUMENT

I. THE SNOWBIRD RELEASE AGREEMENTS ROTHSTEIN VOLUNTARILY SIGNED ARE CLEAR, UNEQUIVOCAL AND ENFORCEABLE.

Rothstein overstates Utah's legal requirement concerning exculpatory agreement language relating to release of claims and assumption of risks. In doing so, Rothstein ignores Utah case law directly addressing these issues.

A. Utah Only Requires That Exculpatory Agreements Clearly and Unequivocally Express a General Intent to Release Claims of Negligence.

In Utah, exculpatory agreements need not enumerate or forecast the precise mechanism of injury to be enforceable. Instead, Utah only requires, as do most states, that an exculpatory agreement clearly and unequivocally express an intent to release claims of negligence.

In Russ v. Woodside Homes, Inc., 905 P.2d 901, 903-904 (Utah App. 1995), the Utah Court of Appeals enforced a hold harmless agreement against the heirs of a woman who fell into a hole in her driveway during construction. The Agreement in no way referred to the specific mechanism of injury (i.e. falling into a hole in the driveway) and, in fact, did not even refer to waiving claims of negligence. Id. Yet, the Utah Court of Appeals found

the Agreement to be “clear and unequivocal” in any event. *Id.* at 906. Indeed, as the Utah Supreme Court held in Freund v. Utah Power & Light Co., 793 P.2d 362, 371-72 (Utah 1990) (*opinion by Justice Howe*), “[a] hold harmless provision is enforceable when ‘the broad sweep of the language employed by the parties clearly covers those instances in which [a party] may be negligent . . . language releasing an indemnitee from ‘**any claims for damages to property and injury or death**’ constituted a sufficiently clear and unequivocal expression to release for alleged negligence”. (emphasis added). *See also, e.g., Milligan v. Big Valley Corp. d/b/a Grand Targhee Ski Resort*, 754 P.2d 1063 (Wyo. 1988) (“It is difficult to envision any other intent of the parties than to release [the resort] from liability for negligence . . . [if] this were not the intent, there would be little purpose in the release at all” - skier’s claims dismissed based on pre-injury Release); Street v. Darwin Ranch, 75 F. Supp.2d 1296, 1302 (D. Wyo. 1999) (rejecting plaintiff’s argument that because the “specific hazard was not identified” the Release was invalid - pre-injury Release enforced in horseback trail outfitter case); Lahey v. Covington, 964 F. Supp. 1440 (D. Colo. 1996) *quoting from Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 785 (Colo. 1989) (“Colorado law does not require that an exculpatory agreement describe in detail **each specific risk** that the signor may encounter” - white-water rafting injury claims dismissed based on pre-injury Release). (emphasis added).

Here, the two Snowbird Release Agreements clearly and unequivocally release claims of negligence. (R. at 185, 191). Indeed, clearer than the release language enforced in Russ and Freund above, the Snowbird Releases conspicuously contain the word “negligence”,

expressly releasing such claims. *See* Alta-Snowbird Release Agreement, Ex. ‘A’ to Addendum (“I agree to hold **harmless and indemnify** Alta and Snowbird, their agents and employees from all of my claims, including those caused by the negligence or other fault of Alta or Snowbird, their agents and employees”) (emphasis in original) and Seven Summits Club Release, Ex. ‘A’ to Addendum (“I release and agree to indemnify Snowbird . . . from all claims for injury or damage arising out of the operation of the ski area or my activities at Snowbird, whether such injury or damage arises from the risks of skiing or from any other cause including the negligence of Snowbird, its employees and agents”). (emphasis in original). Accordingly, Snowbird’s Release Agreements actually exceed Utah’s legal requirements and are, thus, “clear and unequivocal”.

B. Although Not Essential to Enforcement of the Release Agreements, Rothstein Also Expressly Assumed All Risk of Injury.

Rothstein also mistakenly asserts that in order to assume a risk contractually, it must be a voluntary assumption of a known specific risk - in this case, mine timber cribbing just below a flagged, permanent rope-line, necessary to structurally support a cat track. In doing so, Rothstein confuses *express* contractual assumption of risk with the *primary* and/or *secondary* assumption of risk doctrines.

In Jacobsen Construction Co., Inc. et al. v. Structo-Lite Engineering, Inc., 619 P.2d 306, 309-10 (Utah 1980), the Utah Supreme Court made clear that the *express* form of assumption of risk is very different from all other forms. This Court stated in pertinent part:

For purposes of this analysis, assumption of risk is often divided into three categories. Those courts which attempt to deal with the various concepts subsumed under the one label refrain from considering one form, that is, the ‘express’ form of assumption of risk. An express assumption of risk involves a

contractual provision in which a party expressly contracts not to sue for injury or loss which may thereafter be occasioned by the acts of another. We not only follow suit by refraining to include this form of assumption of risk in our discussion, but furthermore fail to see a necessity for including this form within assumption of risk terminology. As stated in James, *Assumption of Risk*, 61 *Yale L.J.* 141 (1952), **the field of contract law is more than adequate to deal with this bar to recovery.** We are thus left with the primary and secondary forms of assumption of risk.

Id. (Emphasis added).

Given the fact Utah “contract law” allows for the broad release of claims in exculpatory agreements without referring to the exact mechanism of injury, there is no reason why *express* contractual assumption of risk provisions need any more specificity. *See also Coates v. Newhall Land & Farming, Inc.*, 236 Cal. Rptr. 181, 184-85 (Cal. App. 2nd Dist. 1987) (“**[K]nowledge of a particular risk is unnecessary where there is an express agreement to assume all risk; by express agreement a ‘plaintiff may undertake to assume all of the risks of a particular . . . situation, *whether they are known or unknown to him.*’** (Rest. 2d Torts, § 496D, com. a, italics added; Prosser & Keaton, Torts, *supra*, § 68, p. 482.) . . . even if [plaintiff] was visiting the [dirt bike] park for the first time, as appellants allege, **‘neither knowledge of the danger involved, nor appreciation of the magnitude of the risk, requires the clairvoyance to foresee the exact accident and injury which in fact occurred’.** (Bold emphasis added). (Italics in original).

Here, Rothstein voluntarily signed two separate Release Agreements for the 2002-2003 season, expressly assuming all risks. (R. at 185, 191). *See Alta-Snowbird Release Agreement*, Ex. ‘A’ to Addendum (“**I agree to assume all risks of personal injury, death or property damage associated with skiing . . . or resulting from the fault of Alta or**

Snowbird”) (emphasis in original) and Seven Summits Club Release Agreement, Ex. ‘A’ to Addendum (“I agree to assume and accept all risks of injury to myself, including the inherent risks of skiing, the risks associated with the operation of the ski area and risks caused by the negligence of Snowbird”) (emphasis in original). Accordingly, Rothstein cannot circumvent his contractual commitments by asserting that Snowbird did not specifically disclose in advance that he could be injured by skiing into mine timber cribbings or similar structures.

II. WHETHER APPLYING *TUNKL* OR ANY OTHER “PUBLIC POLICY” TEST, THE GREAT MAJORITY OF JURISDICTIONS ENFORCE EXCULPATORY AGREEMENTS INVOLVING RECREATIONAL PROVIDERS.

Rothstein erroneously asserts that the two Release Agreements he signed voluntarily are unenforceable based on a six part public policy test established in Tunkl v. Regents of the University of California, 383 P.2d 441 (Calif. 1963). This six part test, not adopted in Utah², examines whether a Release Agreement exhibits the following characteristics:

[1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a

² In Hawkins v. Peart d/b/a Navajo Trails, 37 P.3d 1062, 1065 (Utah 2001) (*opinion by Justice Durrant*), the Utah Supreme Court noted that it has not yet adopted any specific standard for determining the validity of a pre-injury exculpatory agreement. This Court instead relied on extensive public policy related *exclusively to minor children* in evaluating a pre-injury Release Agreement intended to waive liability for injuries sustained by a minor child on a horseback trail excursion. This Court stated: “*Tunkl and Jones [v. Dressel, 623 P.2d 370, 376 (Colo. 1981)] set forth standards for determining whether the public interest in the activity at issue warrants an exception to the general rule allowing releases. However, we need not reach the question of whether to adopt the Tunkl or Jones standard, or any other standard generally relating to the public interest exception, because, in deciding the case before us, we rely on the public policy exception specifically relating to releases of a minor’s claims*”. *Id.* at 1065. (emphasis added).

service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds [itself] out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks [its] services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or [its] agents. *Id.* at 445-46.

What Rothstein fails to recognize, however, is that the great majority of jurisdictions (whether applying Tunkl or not) enforce pre-injury exculpatory agreements in the recreational sports context.³ See Seigneur v. National Fitness Institute, Inc., 752 A.2d 631, 641 (Md. Spec. Ct. App. 2000) (“[C]ourts from other jurisdictions **almost universally** have held that contracts relating to recreational activities do not fall within any of the categories that implicate public interest concerns”). (emphasis added); Henderson v. Quest Expeditions, 174 S.W.3d 730, 734 (Tenn. Ct. App. 2005) (“**The majority view from sister states** is that an exculpatory provision which specifically and expressly releases a defendant from its own negligence **will be upheld, without regard to whether the injury sustained is one typically thought to be ‘inherent in the sport’**” - white-water rafting pre-injury Release enforced) (emphasis added).

³ In Tunkl, the exculpatory agreement at issue sought to release a hospital from liability for negligent hospital care services rendered and had nothing at all to do with recreational sporting activities. Tunkl, 383 P.2d at 441. The great majority of jurisdictions have drawn a strong and clear distinction between essential services such as hospital care, public transportation and utilities *and* purely voluntary, non-essential recreational activities such as skiing. See e.g. Hulsey v. Elsinore Parachute Center, 168 Cal. App. 3d 333, 342 (Cal. App. 4th Dist. 1985) at p.11 herein.

Indeed, even in California (where the Tunkl standard *originated*), courts consistently have refused to invalidate pre-injury exculpatory agreements in the recreational sports context. *See* Platzer v. Mammoth Mountain Ski Area, 128 Cal. Rptr. 885, 888-889 (Cal. Ct. App. 3rd Dst. 2002) (“[C]ourts **routinely** exclude recreational sports from the purview of *Tunkl*, concluding that such activities are not of great public importance or practical necessity” - ordinary negligence claims dismissed on “summary adjudication” based on Release Agreement where individual fell from a chairlift during a ski lesson). (emphasis added); Hulsey v. Elsinore Parachute Center, 168 Cal. App. 3d 333, 342 (Cal. App. 4th Dist. 1985) (“When referring to “essential services” the court in *Tunkl* clearly had in mind medical, legal, housing, transportation or similar services which must *necessarily* be utilized by the general public. Purely recreational activities such as sport parachuting can hardly be considered “essential”. In sum, measuring the transaction here against the *Tunkl* factors, we can see no logical reason for extending the “public interest” limitation on the freedom of contract to the exculpatory agreement here relied on by defendant”). (Italics in original). (Bold emphasis added); *and* Coates v. Newhall, 236 Cal. Rptr. 181, 185 (Cal. App. 2nd Dst. 1987) (““[B]y no means other than a most strained construction could the exculpatory instrument in issue involve the public interest”” - pre-injury Release enforced, dismissing wrongful death dirt bike accident case). (emphasis added).

Most jurisdictions, in fact, enforce exculpatory agreements after simply determining that the subject activity is *not* a “matter of great public importance”, “practical necessity”, or an “essential service”. In Chauvlier v. Booth Creek Ski Holdings, Inc., 35 P.3d 383, 388 (Wash. Ct. App. 2001), the Court enforced a pre-injury exculpatory agreement against a

recreational skier who, similar to Rothstein's allegations, was injured when he skied into "man-made structures" purportedly not visible from above. The Chauvlier Court stated:

'[A] survey of cases assessing exculpatory clauses reveals that the common determinative factor for Washington courts has been the services' or activities' importance to the public . . . Despite its recreational appeal, skiing is not a 'service of great importance to the public,' much less a service of 'practical necessity.' Rather, skiing is a private and nonessential activity [and] cannot be said to be 'vital for the benefit of mankind'.

Id. at 388-89. (Emphasis added). *See also, e.g., Milligan v. Big Valley Corporation, et al.*, 754 P.2d 1063 (Wyo. 1988) (Wyoming Supreme Court *unanimously* enforced a pre-injury Release against a recreational skier who died in a race-related crash at Grand Targhee Ski Resort because (1) the race could "hardly be deemed of great importance to the public or essential to individual members of the public" and (2) Grand Targhee held no "decisive bargaining advantage" because the decedent could have chosen not to ski); Potter v. Nat'l Handicapped Sports, 849 F. Supp. 1407, 1409-10 (D. Colo. 1994) ("By definition and common sense, the [National Handicapped Ski Championships] is neither a matter of great public importance nor a matter of practical necessity" - pre-injury Release enforced); Bauer v. Aspen Highlands Skiing Corp., 788 F. Supp. 472, 474-75 (D. Colo. 1992) ("defendant's recreational services were not essential and, therefore, they did not enjoy an unfair bargaining advantage . . . Plaintiff could have satisfied her business interest by absorbing the ambiance of Aspen without skiing" - pre-injury release enforced). Lloyd v. Sugarloaf Mountain, et al., 833 A.2d 1, 9-10 (Me. 2003) (Pre-injury Release enforced - "hard-pressed" to conclude that the Widowmaker Challenge event was a "public service or that its entrants were under any

compulsion to sign the release”); Allan v. Snow Summit, Inc., 59 Cal. Rptr. 2d 813, 824-25 (Cal. App. 4th Dist. 1996) (Pre-injury Release enforced - recreational activities like skiing are voluntary non-essential services that do not affect the “public interest”).⁴

Here, Rothstein’s voluntary decision to ski at Snowbird does not implicate matters of great public importance or practical necessity anymore so than the other recreational participants above whose claims were dismissed based on pre-injury Releases. Rothstein did not have to ski at Snowbird or anywhere else for that matter and certainly did not have to participate in the Seven Summits Pass program that entitled him to cut in front of other

⁴ The following are examples of *additional* jurisdictions that also enforce pre-injury releases - some, even where no *Tunkl* elements are analyzed. *See e.g.* Harmon v. Mt. Hood Meadows, Ltd., 932 P.2d 92, 97 (Ore. Ct. App. 1997) (Ski resort’s Seasons Pass Release not against public policy (no *Tunkl* analysis) - chairlift loading injury claims dismissed); Webb v. Jiminy Peak, 2002 Mass. App. Div. 16, 18 (Mass. App. 2002) (“[W]e have repeatedly recognized that, at least in the case of ordinary negligence, the ‘allocation [of] risk by agreement is not contrary to public policy’ (no *Tunkl* analysis) - release agreement enforced in favor of ski resort despite ski resort providing plaintiffs with improper boots and/or bindings); Reed v. University of North Dakota, et al., 589 N.W.2d 880, 887 (N.D. 1999) (Pre-injury Release enforced against collegiate hockey player injured in pre-season “road race” because the race did not constitute an “essential” or “public” service and “[plaintiff] was not under economic or other compulsion from [defendant] to sign the release”); Plant v. Wilbur, et al., 47 S.W.2d 889, 894 (Ark. 2001) (Auto racing is not the “type of enterprise . . . people have to rely upon like public transportation or other types of enterprises where people of necessity have to go just to get through life and conduct regular business activities, making a living”); Marc Street v. Darwin Ranch, Inc., 75 F. Supp.2d 1296, 1299 (D. Wyo. 1999) (“Without denigrating the eminent role of equine pursuits in the history, culture and economy of Wyoming, the Court concludes that Defendant’s [horseback trail guide] services plainly are not of sufficient public import to engender a public duty”); McCune v. Myrtle Beach Indoor Shooting Range, et al., 612 S.E. 2d 462, 466 (So. Car. Ct. App. 2005) (Pre-injury Release enforced because “participation in a paintball match is voluntary”); Mazza v. Ski Shawnee, Inc., 74 Pa. D. & C. 4th 416, 421-22 (Pa. Comm. Pleas Ct. 2005) (pre-injury Release enforced because snow tubing at ski resort involved private parties’ affairs and constituted a “purely recreational” activity); and Walton v. Oz Bicycle Club of Wichita, 1991 U.S. Dist. LEXIS 17655, *10-11 (D. Kan. 1991) (Bicycle race pre-injury release enforceable - “[e]ven the fact that a participant considers the sport to be more than a ‘hobby’ and hopes to someday participate at an Olympic level, will not raise the matter to a compelling public interest”).

Snowbird patrons waiting to board the aerial Tram. (R. at 351, 356-362). (*See also* Appellant's Brief at 1, fn.1). Thus, consistent with the great majority of jurisdictions, the Releases voluntarily signed by Rothstein should be enforced.

III. ROTHSTEIN'S APPLICATION OF THE CALIFORNIA *TUNKL* TEST IS STRAINED AND EVEN CONTRADICTS THE *BERLANGIERI* MINORITY DECISION UPON WHICH HE RELIES.

Rothstein's application of the Tunkl standard is so strained it even contradicts Berlangieri v. Running Elk Corp., 76 P.3d 1098 (N.M. 2003), the primary minority decision cited by Rothstein in his trial court Opposition Memorandum. (R. at 216-217). Specifically, Rothstein overreaches by claiming the "first three elements of the *Tunkl* test" are met simply because Utah's Inherent Risk of Skiing Act acknowledges skiing's popularity and that the sport significantly contributes to Utah's economy. The first three Tunkl elements are:

(1) whether the Agreement concerns a business "generally thought suitable for public regulation", (2) whether the party seeking exculpation is engaged in performing a service of great public importance, which is often a matter of practical necessity, and (3) whether the party holds itself out as willing to perform this service for any member of the public coming within certain established standards. Tunkl, 383 P.2d at 445.

In Berlangieri, the New Mexico Supreme Court found that (1) statutory language concerning the "equine industry" only satisfied the first Tunkl element (not the first *three* elements as Rothstein asserts here) and (2) the second Tunkl element actually weighed in favor of enforcing the Release.⁵ Berlangieri, 76 P.3d at 1113.

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Even with respect to the first Tunkl element, because most businesses are "suitable for public regulation" through statutory enactment, this element is arguably the least compelling of the Tunkl test. Legal tests are designed to limit or focus certain inquiries from an infinite pool (*i.e.* the Tunkl public policy *exception* test). Thus, any element of a test that tends to apply to all or almost all situations, is logically the least compelling element.

Rothstein next asserts that *Tunkl's* fourth and fifth elements are met because “all local ski areas apparently impose a similar liability provision as a condition for skiing”. (R. at 216).

Tunkl's fourth and fifth elements examine whether:

(4) As a result of the **essential nature of the service** in the economic setting of the transaction, the party invoking exculpation possesses a **decisive advantage of bargaining strength** against any member of the public who seeks [the party's] services and (5) **[i]n exercising a superior bargaining power**, the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Tunkl, 383 P.2d at 446.

First, Rothstein's allegation assumes the nature of the service (use of a mountain for recreational skiing) to be “essential” - an assumption that is contrary to every opinion addressing this issue. Second, Rothstein's supporting allegation for these elements is untrue. Snowbird and Utah's other ski areas offer lift tickets and ski passes that allow skiing *without signing a Release*. (R. at 351, 356-362). Indeed, Rothstein could have purchased a 2002-2003 Snowbird day lift ticket to access the very same terrain without ever signing an exculpatory agreement as a pre-condition. (R. at 351, 356-362). *See Chauvlier*, 35 P.3d at 388 (“Chauvlier did not have to sign a release in order to buy a one-day ski pass. Although a day pass was more expensive than the Spring Pass he bought, Chauvlier does not contest the fact that he did have the *option* of skiing at Booth Creek without signing a release. Therefore, the exculpatory clause here cannot be a ‘take it or leave it’ adhesion contract”). (Italics in original).

Furthermore, Rothstein's argument concerning other local Resorts using similar Releases has been tried before and rejected in an analogous context. *See Bauer v. Aspen*

Highlands Skiing Corporation, 788 F. Supp. 472, 474-475 (D. Colo. 1992) (“defendant’s recreational services were not essential and, therefore, they did not enjoy an unfair bargaining advantage. **Nor does it matter that all ski rental shops in Aspen required the same release.** Plaintiff could have satisfied her business interest by absorbing the ambiance of Aspen without skiing. Therefore, I conclude that the exculpatory agreement was fairly entered into and is not an adhesion contract”). (emphasis added). In any event, Rothstein could have skied at Park City Mountain Resort or The Canyons Resort during the 2002-2003 ski season without ever signing a Release Agreement. (R. at 351, 356-362). This is especially significant since Rothstein lived in Park City during the 2002-2003 season and, thus, had almost immediate access to world-class Resorts without having to sign any Release Agreements. (R. at 344, 351, 356-362).⁶

Finally, Rothstein asserts that he was subject to defendant’s control (*Tunkl*’s sixth element) with respect to the purported “snow covered retaining wall”. Whether this is true or not is of little consequence given the fact Rothstein’s other arguments regarding the *Tunkl* elements are strained. However, Rothstein, in any event, was not under defendant’s control - Rothstein was not forced or corralled into the subject area and could have easily descended

⁶ Rothstein notes, in passing, that in Rosen v. LTV Recreational Dev., Inc., 569 F.2d 1117, 1123 (10th Cir. 1978), the Tenth Circuit found a Release Agreement exculpating a Colorado ski area to be an unenforceable adhesion contract. Rothstein fails to note, however, that since the Rosen decision, other Tenth Circuit and Federal District of Colorado decisions have made clear that recreational provider Releases, including those in favor of ski areas, are enforceable and not adhesive. See *infra* at p.15., Bauer v. Aspen Highlands Skiing Corporation, 788 F. Supp. 472, 474-475 (D. Colo. 1992) (no adhesion contract because skiing is not an essential activity) and Mincin v. Vail Holdings, Inc., 308 F.3d 1105, 1111 (10th Cir. 2002) (“[T]here is no such ‘practical necessity’ as mountain biking is not an essential activity. Thus, Mincin did not enter into the contract from an inferior bargaining position”).

the mountain on other ski trails/runs. (R. at 345-348). He instead voluntarily chose to ski where he did - an area that undisputedly had an erected rope-line immediately above it with orange streamers for skier awareness. (R. at 207-208).

Accordingly, Rothstein not only demands a result rejected by the great majority of jurisdictions, he does so by incorrectly applying the *Tunkl* elements and contradicting the very cases upon which he relies.

IV. THE FOUR “PUBLIC POLICY” CASES RELIED UPON BY ROTHSTEIN ARE MINORITY HOLDINGS THAT ARE CLEARLY DISTINGUISHABLE IN ANY EVENT.

A. *Dalury v. S-K-I Ltd.* and *Hanks v. Powder Ridge*.

Rothstein’s reliance on Dalury v. S-K-I Ltd., 670 A.2d 795 (Vt. 1995), a disfavored and repeatedly rejected decision, is insufficient to overcome the great majority of jurisdictions finding pre-injury exculpatory agreements enforceable. *See e.g. Street*, 75 F. Supp.2d at 1299-1300 (“Dalury did indeed conclude, based on principles underlying business invitee law, that ski resorts affect the public interest to such a degree as to warrant imposition of a public duty on ski resort operations. **However, Dalury finds little company in that conclusion**”). (emphasis added); Seigneur, 752 A.2d at 641 (“[T]he holding in Dalury is against the great weight of authority”); and Chauvlier, 35 P.3d at 388-389 (specifically rejecting Dalury and enforcing pre-injury exculpatory agreement in recreational skiing context).

Dalury’s focus on a *perceived* loss of incentive for ski areas to act with reasonable care and a *purported* disparity in bargaining power ignores that which the great majority of other jurisdictions recognize: (1) unlike activities that traditionally implicate issues of great public importance such as hospital care, public transportation, and utilities, skiing is a purely voluntary non-essential activity

of no great public import and (2) many recreational activities may cease to exist or become cost prohibitive if exculpatory agreements are invalidated. *See e.g. Clanton v. United Skates of America*, 686 N.E.2d 896, 900 (Ind. Ct. App. 1997) (“To hold that this release is per se unenforceable on the basis that it limits an individual’s recovery for his injuries, as Clanton urges us to do, would invalidate all exculpatory releases connected with a recreational activity. **Such a result would dramatically raise the cost of participation in these activities and severely limit the public’s recreational opportunities**”) (emphasis added); *Donegan*, 894 F.2d at 207 (In enforcing a pre-injury Release, “[t]he court emphasized that . . . the races could not continue without such protection from liability”); *Walton*, 1991 U.S. Dist. LEXIS at *12 (“Here, public policy supports, rather than detracts from, the application of the exculpatory clause. **Unless courts are willing to dismiss such actions without trial, many popular and lawful recreational activities are destined for extinction**”) (emphasis added); and *McCune*, 612 S.E.2d at 466 (“If these agreements, voluntarily entered into, were not upheld, the effect would be to increase the liability of those organizing or sponsoring such events to such an extent that no one would be willing to undertake to sponsor a sporting event”).

Unlike *Dalury*, these “public policy” cases that focus on the recreational provider’s financial health are consistent with the express “public policy” underlying Utah’s Inherent Risk of Skiing Act - *i.e.* protecting Utah ski areas’ economic viability by clarifying the law to encourage more willing liability insurers at lower, more cost effective rates. *See* Utah Code Ann. § 78-27-51. Thus, not only is *Dalury* a disfavored, minority decision, it is the least compatible with the express “public policy” underlying Utah’s Inherent Risk Act.

Hanks v. Powder Ridge, 888 A.2d 734, 747 (Conn. 2005), despite acknowledging that “**most states uphold** [purported] adhesion contracts releasing recreational operators from prospective liability for personal injuries caused by their own negligent conduct”, suffers from the same public policy shortcomings as Dalury. (emphasis added). Additionally, other aspects of the Hanks holding are specifically distinguishable from Utah law and the facts underlying Rothstein’s appeal.

In Hanks, the Connecticut court held that a significant disparity in bargaining power existed because “the plaintiff, who traveled to Powder Ridge in anticipation of snowtubing that day, was faced with the dilemma of either signing the defendants’ proffered waiver of prospective liability or foregoing completely the opportunity to snowtube at Powder Ridge”. Id. at 746. Even if a significant disparity in bargaining power exists in such instances (although most jurisdictions conclude it does *not*), Rothstein’s circumstances were, nevertheless, far different. Rothstein did not travel far distances for one day of skiing only to be confronted with the option of signing a Release or going back home without skiing. Rather, Rothstein purchased not only a Seasons Pass, but a Seven Summits Club membership *well in advance of* the 2002-2003 ski season and the subject incident. (R. at 2-3, 185, 189-191). He had plenty of time to contemplate whether or not he wanted to sign the corresponding Release Agreements. (R. at 2-3, 185, 189-191). Indeed, it is undisputed that Rothstein had other skiing options at Snowbird and elsewhere that he voluntarily chose to forego - he could have skied at Snowbird on a day pass or he could have purchased a Seasons Pass at Park City Mountain Resort in Park City, Utah (where Rothstein resides) without signing any Release. (R. at 351, 356-362).

Finally, the Hanks Court also noted that because Connecticut does not recognize *degrees* of negligence, enforcing exculpatory agreements would limit ski area liability to situations involving conduct *more extreme* than *gross* negligence:

[W]e find it **significant** that many states uphold exculpatory agreements in the context of *simple* negligence, but refuse to enforce such agreements in the context of *gross* negligence. Connecticut does not recognize degrees of negligence and, consequently, does not recognize the tort of gross negligence as a separate basis of liability. Accordingly, although in some states recreational operators cannot, consistent with public policy, release themselves from prospective liability for conduct that is more egregious than *simple* negligence, **in this state, were we to adopt the position advocated by the defendants, recreational operators would be able to release their liability for such conduct unless it rose to the level of *recklessness*. As a result, recreational operators would lack the incentive to exercise even slight care**”.

Id. at 747-48. (Italics in original). (Emphasis added).

Utah, however, recognizes *gross* negligence as a separate basis of liability and, thus, the same concerns expressed in Hanks have no applicability here. See Moon Lake Elec. Assn. v. Ultrasystems Wstrn Const, Inc., 767 P.2d 125 (Utah 1988). Accordingly, Dalury and Hanks provide no basis for reversing Judge Quinn’s correct Ruling dismissing Rothstein’s *ordinary* negligence claim.

B. *Berlangieri v. Running Elk Corporation* and *Phillips v. Monarch* are Likewise Distinguishable and of No Consequence.

The decisions in Berlangieri v. Running Elk Corporation, 76 P.3d 1098 (N.M. 2003), and Phillips v. Monarch, 668 P.2d 982 (Colo. Ct. App. 1983), rely on the interpretation of statutes clearly distinguishable from Utah’s Inherent Risk of Skiing Act, and are, thus, not persuasive here. In Berlangieri, the New Mexico Supreme Court invalidated a pre-injury Release Agreement by focusing specifically on *how* the New Mexico Legislature publicly regulated equine activities. Id. at

1111. Unlike Utah's Inherent Risk of Skiing Act, the New Mexico Equine Liability Act's language and construction *expressly* excludes a litany of acts and/or omissions from its coverage. *Id.* at 1110-1111. Indeed, the Berlangieri Court noted that "[w]e quoted the statute in its entirety to show that, **by far, the bulk of the statute explains what type of activities equine operators may be held liable for, not activities for which they may avoid liability**". *Id.* at 1111. (emphasis added). The Berlangieri Court continued by stating "Subsection C [of the Act] goes into considerable detail in this regard, while 'equine behavior' is only briefly discussed. **This suggests that the Legislature attempted to provide greater protection for patrons of equine activities in the Act than they otherwise would have enjoyed**". *Id.* (emphasis added).

Similarly, in Phillips v. Monarch, 668 P.2d at 987, the *express* statutory duties enumerated in Colorado's Ski Safety Act of 1979 formed the basis for invalidating the pre-injury Release. Colorado's Ski Safety Act enumerates many *express* ski area operator duties of care, including a statutory provision speaking directly to the purported mechanism of injury in Phillips and an additional statutory provision stating that "violation of any requirement of the act which causes injury to any person constitutes negligence". *Id.* at 985-986 and C.R.S. § 33-44-104. These *express* statutory duties of care are completely non-existent in Utah's Inherent Risk Act. *See* Utah Code Ann. §§ 78-27-51-54.

In addition, Rothstein fails to cite Chadwick v. Colt Ross Outfitters, Inc., 100 P.3d 465 (Colo. 2004), a case from the same jurisdiction as Phillips, that *enforced* a pre-injury Release addressing statutory language much more akin to Utah's Inherent Risk of Skiing Act. In upholding the pre-injury Release in Chadwick, the Colorado Supreme Court found the following significant:

Apart from imposing a general requirement to give notice of the inherent risks to be assumed by a participant, see § 13-21-119(5)(a) - - (b), the legislature has, however, done nothing to regulate equine activities or to impose additional duties on equine activity sponsors. Rather, the statute recognizes the inherent risks involved in equine activities and protects sponsors of equine activities by limiting their liability, except under specified circumstances. See § 13-21-119(4)(b). The statute itself imposes no liability on the sponsors for injuries beyond those for which liability is specifically limited, and this court has made clear that parties may, consistent with the statute, contract separately to release sponsors even from negligent conduct, as long as the intent is clearly expressed in the contract.

Chadwick, 100 P.3d at 468. (Emphasis added).

The same statutory analysis in Chadwick that resulted in enforcement of a pre-injury Release could just as easily be applied to Utah's Inherent Risk of Skiing Act. As in Chadwick, Utah's Inherent Risk of Skiing Act (1) imposes no additional duties on ski area operators other than the nominal duty to give notice of the inherent risks, (2) imposes no liability for injuries beyond those for which liability is specifically limited, and (3) specifically endeavors to protect ski area operators by limiting their liability. Utah's Inherent Risk Act, unlike the New Mexico Equine Liability Act in Berlangieri or the Colorado Skier Safety Act in Phillips, does not attempt to provide "greater protection for [ski area] patrons. . . than they otherwise would have enjoyed". Berlangieri, 75 P.3d at 1111. Rather, Utah's Inherent Risk Act expressly seeks to protect *ski areas* from sharply rising insurance premiums and limited insurance coverage options by immunizing ski areas from liability for injuries resulting from a non-exclusive list of inherent risks. Thus, Berlangieri and Phillips are unpersuasive, distinguishable cases that should not be followed here.

V. FOLLOWING ROTHSTEIN'S PUBLIC POLICY CASES WOULD INVADE THE UTAH LEGISLATURE'S PROVINCE BY IGNORING WHAT THE LEGISLATURE DOES WHEN IT INTENDS ON PROHIBITING EXCULPATORY AGREEMENTS.

Following Rothstein's "public policy" cases would require this Court to first imply statutory duties of care in the Inherent Risk of Skiing Act and, from that, manufacture an imagined legislative intent to invalidate *all* pre-injury Releases connected with ski area operations. This asks too much. *See Berube v. Fashion Centre*, 771 P.2d 1033, 1043 (Utah 1989) *quoting from Patton v. United States*, 281 U.S. 276, 306 (1930) ("[T]he theory of public policy embodies a doctrine of vague and variable quality and unless deducible in the given circumstances from **constitutional or statutory provisions**, should be accepted as a basis for judicial determination, **if at all, only with the utmost circumspection**"). (emphasis added); *Retherford v. AT&T*, 844 P.2d 949, 967, fn.11 (Utah 1992) ("**Before we can interfere with the enforcement of [a] private agreement**, we must find the private agreement offends the public policy **embodied in the statute**, offends it so **severely** that it requires striking the term or clause as unenforceable") (emphasis added); *Seigneur v. National Fitness Inst., Inc.*, 752 A.2d 631, 641 (Md. Spec. Ct. App. 2000) ("public policy . . . is a very unruly horse and when once you get astride it you never know where it will carry you. It may lead you from the sound law. **It is never argued at all but when other points fail**"). (emphasis added). (internal citations omitted); *Finch v. Andrews, et al.*, 863 P.2d 496, 497, fn.1 (Ore. Ct. App. 1993) ("A public policy must be **overpowering** before a court will interfere with the parties' **freedom to contract**"). (emphasis added).

The more logical, less attenuated approach dictates examining what Utah's legislature does when it *truly* intends to invalidate exculpatory agreements. This is important because legislative intent normally dictates public policy, especially in areas already addressed by statute. *See e.g.*

Chauvlier v. Booth Creek Ski Holdings, Inc., 35 P.3d 383, 388, fn. 28 (Wash. Ct. App. 2001) (“**We note that since the Washington State Legislature has chosen to regulate recreational skiing by statute, it is for the Legislature, and not the courts, to declare that liability releases in the recreational skiing context violate public policy**”). (emphasis added).

Several Utah statutes make clear that when the legislature’s intent is to prohibit exculpatory or other agreements on public policy grounds, the statute’s express language will so state. For instance, with respect to the construction industry, Utah’s legislature in Utah Code Ann. § 13-8-1 provides:

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building . . . purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitee, **is against public policy and is void and unenforceable**. (emphasis added).

See Seigneur, 752 A.2d at 637 (finding that public policy will only invalidate exculpatory agreements where the legislature **expressly** states so by statute - **citing a Maryland statute almost identical to Utah Code Ann. § 13-8-1 above as an example of express statutory language**). (emphasis added). Similarly, with respect to Utah’s Product Liability Act, Utah Code Ann. § 78-15-7,

Indemnification provisions void and unenforceable, provides:

Any clause in a sales contract or collateral document that requires a purchaser or end user of a product to indemnify, hold harmless, or defend a manufacturer of a product **shall be contrary to public policy and is void and unenforceable** if a defect in the design or manufacturing of the product causes an injury or death.

(Emphasis added). See also Utah Code Ann. § 34-34-4 (“Any express or implied agreement between any employer and any labor union [where an individual] shall be denied the right to work for an employer . . . is hereby declared to be . . . **against public policy**”). (emphasis added).

The Federal District Court for Utah, applying Utah law, in Zollman v. High Country Snowmobile Tours, et al., 797 F. Supp. 923, 927 (D. Utah 1992), recognized this legislative practice when it found a pre-injury exculpatory agreement involving a snowmobile recreational provider *not* against public policy. In Zollman, the plaintiff “suffered numerous injuries, including facial injuries which she allege[d] [were] permanently disfiguring” after defendant’s “guide” directed her to proceed over a “crest”, wherein she collided with another snowmobiler. Id. at 924. As a condition of using defendant’s snowmobiles and land, defendant required its customers to sign a release agreement, which plaintiff did. Plaintiff argued, however, that the Release violated the public policy incorporated in Utah’s Off-Highway Vehicle Act, Utah Code Ann. § 41-22-1 to -33. The Federal District Court for Utah rejected plaintiff’s “public policy” argument despite express statutory language stating:

[I]t is the policy of this state to promote safety and protection for persons, property and the environment connected with the use, operation and equipment of off-highway vehicles.

Id. at 926, fn.7. (emphasis added). In doing so, the Court focused instead on the Off-Highway Act’s absence of language prohibiting parties from contracting to “limit their liability” and on the Limitation of Landowner Liability Act’s similar silence. Id. at 927.

The Zollman Court stated:

The Act deals little with instruction in snowmobile training **and in no place suggested that parties providing such training cannot seek to limit their liability.** The court will not strain to find such a reading of the release agreement. Second, elsewhere in the Utah Code, the legislature has expressly limited the liability of landowners who, without charging admission, make their land available to others for recreational purposes. See Utah [C]ode Ann. § 57-14-1 to -7 (1988). This provision does not limit liability for those who charge admission to others for the recreational use of property under their control. *Id.* at § 57-14-6. **Nevertheless, the legislature did not preclude such landowners from seeking to limit liability. Based on the foregoing provisions of Utah law, the court concludes that it is not public policy of the state of Utah to prohibit a business such as High Country from seeking to limit its liability. *Id.* (Emphasis added).**⁷

See also Sorenson's Ranch School, et al. v. Dept. of Human Services, et al., 36 P.3d 528, 532 (Utah 2001) (Department's public policy argument that the Legislature, through U.C.A. § 62A-4a-401, *implicitly* intended to ban all felons from working at any child service facility *failed* where two other Utah statutes "**specifically and expressly**" banned felons from other types of employment - "Had the Legislature wished to eliminate all convicted felons from working at a licensed youth program it could have done so **explicitly** as it did in the above cited sections"). (emphasis added).

Utah's Inherent Risk of Skiing Act in no way prohibits ski areas from using exculpatory agreements. Had Utah's legislature intended on prohibiting such agreements, it would have done so expressly as it has in other contexts. Finally, where, as here, Utah's Inherent Risk Act represents a direct affirmative attempt to protect Utah's ski industry (i.e. by encouraging more willing insurance providers at more cost-effective rates), pre-injury Releases do not at all, let alone "severely" offend that public policy. Thus, this Court should affirm the dismissal of Rothstein's *ordinary* negligence claim.

⁷ Although the Zollman Court found no public policy violation, it found the Release's language to be unclear and, thus, unenforceable based on verbal instructions purportedly given to Zollman by the defendant's employee. Zollman, 797 F. Supp. at 926, 928.

VI. ROTHSTEIN'S OUT-OF-CONTEXT CITATION TO LEGISLATIVE HISTORY DOES NOT INVALIDATE THE RELEASES HE SIGNED VOLUNTARILY AS AN ADULT.

Rothstein's selective citation to the Inherent Risk of Skiing Act's legislative history should not be considered and, in any event, misleads this Court with respect to the legislative intent concerning exculpatory agreements.

A. Nothing in the Inherent Risk of Skiing Act Suggests that Utah's Legislature Intended to Invalidate Exculpatory Agreements and, Thus, Under Utah Law, It Is Improper to Consider Legislative History.

It is well-established that the legislature's intent "is manifested by the language it employ[s]" and that courts can look to secondary principles of statutory construction or legislative history "only if we find the [statutory] provision ambiguous". Smith, et al. v. Price Development Company, 125 P.3d 945, 949-50 (Utah 2005). (emphasis added). In Smith, the Utah Supreme Court reviewed Utah's Split Recovery provision, Utah Code Ann. § 78-18-1(3), concerning punitive damage awards. This Court considered whether under the Split Recovery provision the State of Utah held an interest in the "punitive damages" *judgment* entered in favor of plaintiffs or only a portion of *the proceeds* once paid. This Court held that the statutory provision's language made clear that the State of Utah did not hold an interest in the *judgment* itself, declining to "consider the secondary evidence advanced by the State". Id. 950-51. In doing so, this Court relied on what the statute did *not* say as much as what the statute did say:

It is significant that the provision contains no language making the State a party to the Smiths' action or a judgment creditor in the Smiths' punitive damages award . . . The State essentially asks us to redraft the provision, inserting language that the legislature did not and removing language that the legislature selected.

Id. at 950. (emphasis added).

The fact Utah's Inherent Risk of Skiing Act "contains no language" barring exculpatory agreements is especially "significant" here because, as mentioned in Section V above, when Utah's legislature seeks to bar exculpatory or other agreements, it states so expressly. Instead, the Inherent Risk Act's *express* "Public Policy" provision makes abundantly clear its underlying motivation - i.e. to protect Utah's ski industry by encouraging lower premiums and more willing insurers through clarification of the existing common law. Utah Code Ann. § 78-27-51 states:

Public Policy. The Legislature finds that the sport of skiing is practiced by a large number of residents of Utah and attracts a large number of nonresidents, significantly contributing to the economy of this state. **It further finds that few insurance carriers are willing to provide liability insurance protection to ski area operators and that the premiums charged by those carriers have risen sharply in recent years due to confusion as to whether a skier assumes the risks inherent in the sport of skiing.** It is the purpose of this act, therefore, to clarify the law in relation to skiing injuries and the risks inherent in that sport, and to provide that, as a matter of public policy, no person engaged in that sport shall recover from a ski operator for injuries resulting from those inherent risks. (emphasis added).

Thus, similar to Smith, the Inherent Risk Act's legislative intent permitting exculpatory agreements is clear because of what it says and *does not* say. As such, consideration of legislative history is improper here.

B. Even If Legislative History is Considered, Ski Area Exculpatory Agreements Do Not Violate the Inherent Risk Act's Public Policy.

Given Utah courts' refusal to interfere with private agreements unless a statute's public policy is "severely offended", Rothstein's reliance on the legislature's *incidental, passive* retention of an already-existing *common law* duty to act in a "non-negligent manner" is insufficient to invalidate ski area exculpatory agreements. Retherford v. AT&T, 844 P.2d 949, 967, fn.11 (Utah 1992) ("Before we can interfere with the enforcement of [a] private agreement, we must find the private

agreement offends the public policy **embodied in the statute**, offends it so **severely** that it requires striking the term or clause as unenforceable”) (emphasis added).

Instead, where, as here, the legislative history evidences an intent to *protect* the recreational provider (in this case, ski area operators) by *limiting* their liability exposure, exculpatory agreements are actually *consistent with* the Inherent Risk Act’s public policy and should therefore be enforced. In Marc Street v. Darwin Ranch, Inc., 75 F. Supp.2d 1296, 1300 (D. Wyo. 1999), the plaintiff signed a Release Agreement prior to participating in a horseback ride, which he later tried to avoid under the guise of public policy. The Court rejected plaintiff’s public policy contention, instead finding the pre-injury Release to be consistent with the Wyoming Recreational Safety Act’s goal of immunizing recreational providers from liability associated with inherent risks. The Federal District Court for Wyoming stated:

T]he true public policy expressed by the Act is to benefit the recreation industry and Wyoming economy by eliminating provider liability for inherent recreation activity risks. The Release is, at the very least, consistent with the public policy expressed by the Act, if not in furtherance of it. Plaintiff’s position that the Release violates a policy expressed by the Act is, to be frank, bewildering.

Id. at 1300-1301. (Emphasis added). (Internal citations omitted)

Similarly, in Henderson v. Quest Expeditions, Inc., 174 S.W.3d 730, 733 (Tenn. Ct. App. 2005), the Tennessee Court of Appeals recently found a pre-injury Release barring negligence claims to be consistent with the legislature’s goal of “**maintaining the economic viability of commercial white water rafting operations . . . by discouraging claims based on injury, death or damages resulting from risks inherent in white water rafting**”. (emphasis added). *See also* Clanton v. United Skates of America, 686 N.E.2d 896, 900 (Ind. Ct. App. 1997) (“Given

that our legislature has clearly expressed its desire to encourage recreational activities by **limiting the liability of landowners** who open their property for recreational use by the public and [plaintiff's] failure to cite any legislation which **specifically** prohibits such a release, we cannot conclude that this exculpatory release violates public policy"). (emphasis added). Chadwick v. Colt Ross Outfitters, 100 P.3d at 468 (Pre-injury Release consistent with Colorado equine activities statute and, thus, enforceable because the statute seeks to "protect sponsors of equine activities by limiting their liability").

Here, former Utah Senator Fred Finlinson, the original sponsor of the Inherent Risk Bill, made clear the underlying legislative intent to protect Utah's ski area operators. Senator Finlinson stated that the increase in lawsuits against ski areas "**has created potential problems for our ski areas**. So, **as a result**, many of the ski area states, that have ski resorts, have moved in a position of modifying and clarifying in their law that the ski area is not responsible for injuries that come from the inherent risks of skiing". (Senate Floor Debate Audio Recording, Feb. 17, 1979, Disk 184), attached as Exhibit 'B' to Addendum. The Senator further added that:

We are just clarifying the law to make sure that the law says that the skier is responsible for getting down the mountain under his own power. That was the basic thrust of what this Bill does. As we make that change that will have a, hopefully a good impact on the kinds of costs that are incurred in the liability insurance that they have to go out and buy in order to make sure that they can operate their resort. (Senate Floor Debate Audio Recording, Feb. 19, 1979, Disk 187).

Indeed, Senator Finlinson, by *sworn Affidavit*, makes clear that it is a "complete fabrication" to assert that exculpatory agreements offend the Inherent Risk of Skiing Act's public policy or that the Act intended on barring exculpatory agreements. (See Finlinson Affidavit, attached as Exhibit 'B' to Addendum).

Because the “secondary evidence” clearly shows an over-riding intent to protect Utah’s ski areas by encouraging more willing insurance carriers at lower premiums, no public policy is offended by enforcing exculpatory agreements, let alone “severely offended”. Thus, whether legislative history is considered or not, the end result is the same - ski area exculpatory agreements are enforceable.

CONCLUSION

The two Release of Liability Agreements signed voluntarily by Rothstein, a 50 year old long-time recreational skier, are clear and unequivocal, do not violate public policy, and should be enforced. Accordingly, Snowbird respectfully requests this Court to affirm Judge Quinn’s Ruling, dismissing Rothstein’s *ordinary* negligence claims *with* prejudice.

DATED this 17th day of August, 2006.

STRACHAN & STRACHAN

A handwritten signature in black ink, appearing to read "Kevin J. Simon", written over a horizontal line.

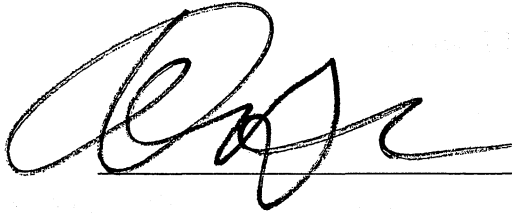
Kevin J. Simon

Attorneys for Defendant/Appellee Snowbird

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2006, a true and correct copy of the foregoing **APPELLEE'S BRIEF** was served by hand-delivery on the following:

Jesse Trentadue, Esq.
Sutter Axland
8 East Broadway, Suite 200
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read 'Jesse Trentadue', is written over a horizontal line.

ADDENDUM

Exhibit A - Release of Liability Agreements and related deposition testimony of Rothstein (R. at 185-191, 343, 344).

Exhibit B - Sworn Affidavit of Fred W. Finlinson.

EXHIBIT ‘A’

**RELEASE & INDEMNITY AGREEMENT
("Agreement")**

THIS IS A BINDING LEGAL CONTRACT.

PLEASE READ CAREFULLY BEFORE SIGNING.

I am aware that skiing, in its various forms ("skiing") is a hazardous sport involving the risk of injuries and death. In consideration for my use of the Alta or Snowbird ski areas, I hereby **waive all of my claims**, including claims for personal injury, death and property damage, against Alta or Snowbird, their agents and employees. I **agree to assume** all risks of personal injury, death and/or property damage associated with skiing, snowboarding and/or jumping or resulting from the fault of Alta or Snowbird, their agents and employees. I **agree to hold harmless and indemnify** Alta and Snowbird, Their agents and employees from all of my claims, including those caused by the negligence or other fault of Alta or Snowbird, their agents and employees. I **agree** that any litigation that I or my representatives initiate against Alta or Snowbird, their agents and employees shall be brought exclusively in Salt Lake County, Utah, and that the laws of the State of Utah shall govern.



Signature of Skier

Pass #

Date Pass Type

Cashier Dept



I M P O R T A N T !

Please read both sides of this card carefully and sign your name in the spaces provided.

Please print clearly

Name William A. Rothstein

Date of Birth 09.23.52

Address 1301 Plumigan Ct.

City Park City State UT Zip 84098

Country

Telephone 435-645-9577

e-mail Address telervul1@aol.com

COPY OF TRANSCRIPT

THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY STATE OF UTAH

**WILLIAM ROTHSTEIN,
an individual,**

Plaintiff,

Case # 040925852

vs.

Judge Anthony Quinn

**SNOWBIRD CORPORATION, a Utah
corporation,**

Defendant.

DEPOSITION OF WILLIAM ANDREW ROTHSTEIN

~~~~~  
**TAKEN AT:**                      The Law Offices of Sutter, Axland  
                                         8 East Broadway, Fourth Floor  
                                         Salt Lake City, Utah

**DATE:**                              Wednesday, April 13, 2005

**TIME:**                              9:13 a.m.

**REPORTED BY:**                Scott M. Knight, RPR



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**Salt Lake City**

**Washington, DC**

**New York**

**Los Angeles**

Corporate Office: 50 West Broadway, Suite 900 Salt Lake City, Utah 84101

1 Q. At the time you purchased the Seven  
2 Summit pass in Ann Borgione's office with Ori, did  
3 you sign a release?

4 A. Yes.

5 Q. And did you read the release?

6 A. Yes.

7 Q. Did you understand the release?

8 A. I believe so.

9 Q. Okay. Did you ask Ann Borgione any  
10 questions about the language of the release?

11 A. I don't believe so.

12 Q. Had you signed any similar releases  
13 before you purchased the Seven Summits pass for  
14 the 2002-2003 ski season from Ann Borgione?

15 A. I'm sorry. I don't understand the  
16 question.

17 Q. Let me ask it again, then. Had you  
18 signed any other release prior to the release you  
19 signed when you purchased the Seven Summit pass  
20 from Ann Borgione?

21 A. I think what you mean is every time I  
22 bought a season's pass at a ski resort I've  
23 signed a similar release.

24 Q. Okay. And which other resorts have you  
25 purchased a season pass at beside the Seven



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1 Summits one for 2002-2003 at Snowbird?

2 A. Park City, Deer Valley, and The  
3 Canyons.

4 Q. And which years did you buy season  
5 passes when you signed releases at those three  
6 resorts?

7 A. During my tenure in Park City, which is  
8 15 years, I've purchased at all three--four of  
9 these resorts, Snowbird, Canyons, Park City, and  
10 Deer Valley.

11 Q. Each of the 15 years you've lived here.

12 A. No.

13 Q. Okay. Okay. Then tell--

14 A. Each of the 15 years I've purchased a  
15 pass somewhere.

16 Q. Okay.

17 A. I believe at Snowbird I've at least  
18 purchased coupon books and Deer Valley coupon  
19 books and--I believe it's the same release whether  
20 you buy a coupon book or a full season's pass.

21 Q. Okay. Have you ever refused to sign a  
22 release at any of the resorts that you have  
23 bought season passes and coupon books?

24 A. No.

25 Q. What's your understanding of the effect



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1 BY MR. STRACHAN:

2 Q. The court reporter, Mr. Rothstein, has  
3 marked what's Exhibit 1. Is that your signature  
4 at the bottom?

5 A. Yes.

6 Q. And is that the release that you signed  
7 when you purchased the 2002-2003 Seven Summits  
8 season pass at Snowbird?

9 A. Yes.

10 Q. Would you read it, please?

11 A. "I am aware that skiing, in its various  
12 forms, is a hazardous sport involving the risk of  
13 injuries and death. In consideration for my use  
14 of the Alta or Snowbird ski areas, I hereby waive  
15 all my claims, including claims for personal  
16 injury, death, and property damage against Alta or  
17 Snowbird, their agents and employees. I agree to  
18 assume all [of the] risks of personal injury  
19 death, . . . or property"--"property damage  
20 associated with skiing, snowboarding, and/or  
21 jumping or resulting from the fault of Alta [or]  
22 Snowbird, their agents and employees. I agree to  
23 hold harmless and indemnify Snowbird and Alta,  
24 their agents and employees from all of my claims,  
25 including those caused by negligence or other



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1 fault of Alta or Snowbird, their agents and  
2 employees. I agree that any litigation that I or  
3 my representatives initiate against Alta or  
4 Snowbird, their agents and employees shall be  
5 brought exclusively in Salt Lake County . . . ,  
6 and the laws of the State, of Utah shall govern."  
7 Signed by me.

8 Q. Thank you. Have you discussed that  
9 release marked Exhibit 1 with anyone other than  
10 your Counsel, Mr. Trentadue, and anyone else in  
11 his firm?

12 A. No.

13 Q. Approximately how many times had you  
14 skied in the 2002-2003 ski season prior to the  
15 February 3, 2003, incident?

16 A. Fifty.

17 Q. At Snowbird?

18 A. I don't recall.

19 Q. When you ski Snowbird, you ride the Gad  
20 Zoom lift.

21 A. Not very often.

22 Q. But you've ridden it.

23 A. Yes.

24 Q. Okay. And you've ridden the Gad 1  
25 lift.



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for an annual membership in Seven Summits Club and I have enclosed my payment for so doing, I agree that if my membership is approved, I will abide by the following terms and

I agree that I have read, understood and will abide by the Skier's responsibility code (a copy is attached, in the trail map) and the membership policies of the Seven Summits Club. I further agree that using Seven Summits Club's facilities and those of Snowbird Ski and Summer Resort I will conduct myself in a manner consistent with membership in an exclusive club. I also agree to treat Snowbird guests and employees with courtesy and respect.

I agree the Seven Summits Priority Pass can be revoked for failure to adhere to the skier's responsibility code, for violation of Snowbird's rules, policies or procedures, for skiing in closed areas, for skiing in a reckless or out of control manner or in a manner that could cause injury or harm to others, for allowing a non-designated user to use the Seven Summits Priority Pass or any other benefits reserved solely for Seven Summits Club members. Should the Seven Summits Priority Pass be revoked, I agree that I will receive no refund, in full or part, of my membership fee.

I understand that this application will be subject to approval of Snowbird Ski and Summer Resort, at its sole and absolute discretion.

I acknowledge that my membership constitutes a revocable license to use the locker room and lounge, ski mountain and any other facilities at Snowbird and does not confer upon me any ownership interest, management rights, management input, or confer upon me any vested or prescriptive right or easement, in or to the locker room and lounge. I further acknowledge that all of the locker room and lounge is owned and operated exclusively by Snowbird Ski and Summer Resort.

If approved for a membership in Seven Summits Club, I agree that Snowbird Ski and Summer Resort have the right, in its sole discretion, to reserve memberships, to terminate or modify the membership agreement, to increase or decrease the number of memberships offered, to discontinue operation of the locker room or lounge or both (any change in the locker room or lounge will not occur during the year for which I have paid membership fees), to issue or terminate any membership, and to make any other changes in the terms and conditions of the membership or the lounge and locker room available for use by members.

**I hereby acknowledge that the use of the locker room, lounge, ski mountain and any privilege or service incident to my membership in Seven Summits Club is undertaken with knowledge of the risk of possible injury. I am aware that skiing and snowboarding in their various forms (Skiing) are hazardous sports involving the risk of injuries and death. In consideration of my use of the Snowbird Corporation (Snowbird) ski area and facilities, I agree to assume and accept all risks of injury to myself and my guests, including the inherent risks of skiing, the risks associated with the operation of the ski area and risks caused by the negligence of Snowbird, its employees, or agents. I release and agree to indemnify Snowbird, all landowners of the ski area, and their employees and agents from all claims for injury or damage arising out of the operation of the ski area or my activities at Snowbird, whether such injury or damage arises from the risks of skiing or from any other cause including the negligence of Snowbird, its employees and agents. I agree never to sue Snowbird, its employees or agents on any claim arising out of the operation of the ski area or my activities at Snowbird. This Agreement is binding on my heirs and assigns.**

Applicant's Signature



Date

11-20-02

This application shall not be binding upon Snowbird Ski and Summer Resort until the acceptance form is signed.

APPROVED AND ACCEPTED:

Snowbird Ski and Summer Resort  
Seven Summits Club

Date

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## **EXHIBIT ‘B’**

[illegible]

I, Fred W. Finlinson, after being duly sworn, hereby testify as follows:

1. I am over twenty-one (21) years old and can competently testify as to and have personal knowledge of the matters described below.
2. I am a former Utah Senator and the sponsor of the original Inherent Risk of Skiing Bill, that was enacted in 1979. I was also involved in the floor debates and committee meetings involving my Bill.
3. I am thus qualified to testify as to the true intent underlying my Bill and the Inherent Risk of Skiing statute that directly resulted.
4. The intent of and sole driving force behind Utah's Inherent Risk of Skiing Act was to help protect ski area operators by statutorily immunizing them from liability for risks inherent in the sport of skiing, snow-boarding and other related activities. That is abundantly clear from the "Public Policy" provision in the Inherent Risk of Skiing Act, U.C.A. § 78-27-51.
5. Sharply rising insurance premiums, the limited availability of willing insurers, and the resulting economically injurious effect to Utah's ski areas was the impetus behind the Bill and the resulting Inherent Risk of Skiing Act.
6. The lack of clarity in the common law made the insurance industry reluctant and, for the most part, unwilling to insure Utah's ski areas. We wanted to clarify the law specifically to reverse that trend so that ski area operators' insurance premiums would hopefully drop significantly and more insurers would be willing to write liability insurance policies for Utah's ski resorts.
7. The Act was not intended to establish ski area operator duties of care or to protect skiers and we intentionally did not enumerate statutory ski area operator duties like some other states have done because we felt it would be detrimental to our goal of protecting Utah's ski area operators.

8. During the legislative process associated with the passage of the Inherent Risk of Skiing Act, there was no discussion about prohibiting private contracts that release ski area operators from liability for their own negligence.

9. Had Utah's Legislature intended on prohibiting Release Agreements in favor of ski area operators, we would have said so expressly as we have in other state statutes we have enacted. We did nothing of the sort with respect to the Inherent Risk of Skiing Act and to find that we did or that release agreements offend public policy would be a complete fabrication based on my sponsorship of the Inherent Risk of Skiing Act.

DATED this 8<sup>th</sup> day of August, 2006.

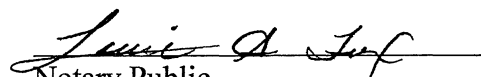
  
Fred W. Finlinson

STATE OF UTAH                    )  
                                          :SS  
COUNTY OF UTAH )

On August 8<sup>th</sup>, 2006, before me, LORRIE A. FOX, a Notary Public of the State of Utah, personally appeared FRED W. FINLINSON, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same, and that by his signature on the instrument, the person executed the instrument.

Subscribed and sworn to before me this 8<sup>th</sup> day of August, 2006.



  
Notary Public  
Residing in West Jordan, UT